UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Docket no. 00-CR-89-B-S
DAVID W. BERRY,	)	
	)	
Defendant	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

SINGAL, District Judge.

Before the Court is Defendant David W. Berry's Motion to Dismiss or in the Alternative to Continue (Docket #5) the case against him for possession of child pornography. For the reasons discussed below, the Court DENIES Defendant's Motion in its entirety.

I. PROCEDURAL BACKGROUND

Defendant has been indicted for three counts of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Counts One and Two each accuse Defendant of possessing images "of child pornography, specifically a computer graphic image that had been created, adapted and modified to appear that an identifiable minor … is engaging in sexually explicit conduct…." (Indictment (Docket #1).) Count Three relates to possession of an image portraying actual minors engaging in sexually explicit activity.

II. DISCUSSION

Defendant argues that the definition of "child pornography" under the Child Pornography Prevention Act of 1996 ("CPPA"), 18 U.S.C. § 2252A et seq., is unconstitutionally vague and overbroad and that it impinges on speech protected by the First Amendment. The statute states that

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct….

18 U.S.C. § 2256(8). Count Three employs the definition of child pornography found in section 2256(8)(A), the constitutionality of which Defendant does not assail. Instead, Defendant attacks the constitutionality of the definition found in section 2256(8)(C), which the Indictment relies on for Counts One and Two.

Defendant argues that sections 2256(8)(C) and 2252A(a)(5)(B) operate together to create a chilling effect on protected speech in violation of the First Amendment. In particular, Defendant contends because the that statute prohibits possessing images that "appear" to be of identifiable minors, instead of simply outlawing images of actual minors, it is unconstitutionally vague and overbroad.

In United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), however, the First Circuit ruled that the CPPA does not violate the First Amendment by criminalizing the possession of images that appear to be of minors engaging in sexual activity, pursuant to section 2256(8)(B). See id. at 76-77. Reiterating the legal principle that child pornography is not a form of protected speech, the court noted that the United States can have a compelling government interest in prohibiting the possession of pornographic images that were created without the involvement of actual minors. See id. at 69-70 (citing New York v. Ferber, 458 U.S. 747, 763-64 (1982)). Relying on congressional intent, the First Circuit found that the definition of child pornography relating to images that "appear" to be of minors means "visual depictions 'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'" Id. at 72 (quoting S. Rep. No. 104-358, at pt. I (1996)). The court held that the definition found in paragraph (B), "appears to be … a minor," was not unconstitutionally overbroad or vague, rather that it validly prohibited harmful material. See id. at 76-77.

Defendant maintains that the definition found in paragraph (C), "appear that an identifiable minor" is unconstitutionally vague and overbroad. In light of Hilton, however, Defendant's argument has no merit. Raising the same arguments made by the within Defendant, the defendant in Hilton asserted that Congress had gone too far by criminalizing images that appear to be of minors. Even though the First Circuit addressed paragraph (B) rather than paragraph (C), Hilton's holding and the rationale behind it foreclose Defendant's argument. Based on Hilton, the Court concludes that section 2256(8)(C) does not proscribe protected speech and that it is not

unconstitutionally vague or overbroad. Therefore, it would be inappropriate to dismiss the Indictment against Defendant.

In the alternative, Defendant requests that the Court continue his case pending the disposition of a suit currently before the United States Supreme Court, Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), cert. granted, 121 S. Ct. 876 (2001). In Free Speech, the Ninth Circuit found that the CPPA's definitions of child pornography in paragraphs (B) and (D) of section 2256(8) were unconstitutionally vague and overbroad. See id. at 1097. Free Speech, however, stands alone among the Courts of Appeal, while Hilton has been followed by both the Fourth and Eleventh Circuits. See United States v. Mento, 231 F.3d 912, 923 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 652-53 (11th Cir. 1999). Moreover, it is not customary for this Court to delay in its proceedings because of the possibility that another case's outcome may impact the status of the law, especially when the First Circuit has provided clear guidance on the issue. See Wicker v. McCotter, 798 F.2d 155, 157-58 (5th Cir. 1986) (courts should continue to apply binding precedent even though the Supreme Court has granted certiorari on a potentially relevant case). Thus, the Court is not persuaded that the case should be continued.

III. CONCLUSION

Based on the foregoing, the Court DENIES Defendant's Motion in its entirety.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 12th day of March 2001.

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